would have come to light that she was receiving remuneration. In my view the reason advanced has no merit.

(3) Section 12(3) prohibits the holding of any office or engaging in any employment during the period of pupillage without special leave from the Bar Council. It would seem that merely the receipt of remuneration during this period by pupils was not prohibited by the section and in fact the section does not preclude remuneration received from his master. The law seems to be silent whether special leave would also be necessary where remunerations were received from other sources than the master as opposed to holding an office or engaging in an employment during the period of pupillage. In my opinion special leave was not necessary where remuneration only was received by the pupil without physically involving himself in employment other than his pupillage. The provision is necessary because during pupillage the pupil was required to devote full attention to the laws or to the subject he was studying and to ensure that there was no conflict of interest with his master's. But to preclude a pupil from receiving remuneration entirely, would deprive him of subsistence during the period of pupillage which may last over 12 months. And this in my opinion, is not the intention of the legislature.

(4) There have been precedents as brought to my attention by the representative of the Attorney-General that numerous police officers and customs officers were receiving paid leave during pupillage and there has been no previous objection from the Bar Council or the Bar Committee on their admission. Basing on this, the Attorney-General offered no objection to the present petition which I think was the correct attitude.

In the event I held that special leave would not be necessary in the circumstances of this case.

It is to be noted that the Bar Council whose special leave was required by law to be obtained in cases of this nature, and its authority allegedly infringed, does not pursue this appeal, but the Johore Bar Committee for its own reason does.

Order accordingly.

HARI RAM SEGHAL v. PUBLIC PROSECUTOR

[A.Cr.J. (Wan Yahya J.) October 14, 1980]
[Malacca — Criminal Application No. 2 of 1980]

Criminal Law and Procedure — Revision — Disposal of outstanding appeals when records have become unobtainable — Revisionary powers of High Court — Application of English Procedure — Criminal Procedure Code (F.M.S. Cap. 6), ss. 5 & 323 — Courts of Judicature Act (Act 91), s. 31.

This was a motion seeking to move the court into exercising its revisionary powers to dispose of two outstanding appeals, the records of which have become unobtainable. On September 28 the applicant who was then a Chief Inspector of the Royal Malaysian Police was charged and jointly tried on two charges under Penal Code sections 352 and 323, respectively. At the conclusion of the hearing the trial Magistrate found the offences against him proved and in respect of the first one, he bound over the application under section 173A(ii)(b) of the Criminal Procedure Code without recording a conviction in the sum of $200 with one surety to be of good behaviour for 6 months and in respect of the second one, he convicted and fined the applicant $500, in default 3 months' imprisonment. Subsequently appeals were filed in respect of both charges. Having performed all that was needed of him for the moment the applicant patiently waited for the delivery of the records of proceedings and the grounds of judgment but both remained undelivered. It appeared that the Magistrate who tried the case had taken possession of the entire records for the purpose of writing his grounds of judgment. When the Magistrate left Malacca to pursue his degree course, he took along the records of this case and several others with him to the campus and for reasons best known to him he had ignored or neglected to write the grounds of his decision or return the records of proceedings to the registry inspite of numerous demands by the court as well as higher authorities.

Held: (1) the powers of revision by a High Court, as contained in Part VII of the Criminal Procedure Code and under section 31 of the Courts of Judicature Act must be given a wider interpretation. The object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence;

(2) the powers of the courts in England to intervene and make rules not provided in the criminal procedure are inherent and are exercisable to correct any injustice. The power to make rules such as the Judges' Rules, notice of additional evidence and power to expunge words from records are some examples of this inherent power. By virtue of section 5 of the Criminal Procedure Code, the use of this power could be extended to this country provided it does not conflict with our statutory provisions;

(3) both the principles of justice and equity call for the court's intervention and the exercise of its inherent and statutory powers in this revision; the finding and the binding over order made under section 173A(ii)(b) of the Criminal Procedure Code by the Magistrate should be set aside and in lieu thereof the court would acquit and discharge the applicant on the first charge; Similarly the court quashed and discharged the application on the second charge and ordered that the fine, if paid, be refunded to him.

Per curiam: The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognised machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

Cases referred to:-

(1) *Connelly* v. *Director of Public Prosecutions* [1964] 2 All E.R. 401.

(2) *Director of Public Prosecutions* v. *Humphrys* [1976] 2 All E.R. 497.

(3) *R.* v. *Payne & Spillane* [1971] 3 All E.R. 1146.

CRIMINAL APPLICATION.

F.H. D'Cruz for the applicant/appellant.

Hassan bin Ibrahim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: This is essentially a motion seeking to move the court into exercising its revisionary powers to dispose of two outstanding appeals, the records of which have become unobtainable.

The episode leading to this application is as follows: On September 28, 1976 the applicant, who was then a Chief Inspector attached to the Royal Malay-

sian Police, was charged and jointly tried on two charges under section 352 and section 323 of the Penal Code. At the conclusion of the hearing the trial Magistrate found the offences against him proved and, in respect of the first one, he bound over the applicant under section 173A(ii)(b) of the Criminal Procedure Code without recording a conviction in the sum of $200 with one surety to be of good behaviour for 6 months; and, in respect of the second one, he convicted and fined the applicant $500, in default 3 months' imprisonment.

The brief undisputed account of the case, as outlined by the applicant's counsel, Mr. Hilary D'Cruz, from the bar table, indicates that the incidents had taken place at Jalan Bendahara, Melaka. An unidentified person had fallen off from the top of a building on to the road. This happened at the time when the patrons from a nearby theatre were leaving after the show. A large crowd had gathered at the spot causing the traffic to come to a halt. The applicant, who happened to be the Investigating Officer for the past six successive days, was ordered by his superior to rush to the scene to restore the flow of traffic and render any possible assistance to the fallen person. The applicant used a stick, which he waived around to keep the crowd back. Whilst so engaged, he had struck the first complainant. The second incident allegedly took place as the applicant was forcing his way towards the fallen body. The second complainant, who got into the applicant's way, was pushed down. It was submitted by the learned counsel that the strain of being on duty for six consecutive days must have caused a severe strain on the applicant causing him to be less careful and thus accidentally striking the first complainant and that such strain must have presumably made him less tolerant when the second complainant argued with him resulting in his pushing the other person to the ground.

An appeal was filed in respect of the second charge on December 27, 1977, well within the statutory period. No action was taken in respect of the first charge until January 3, 1978, presumably because the applicant was under the misapprehension that an order of binding over under section 173A of the Criminal Procedure Code would not expose him to an action of dismissal from service under the General Orders. However, the applicant did succeed in moving the High Court to grant him an extension of time to file his notice of appeal and it was subsequently filed in the Magistrate's Court on May 17, 1978.

Having performed all that was needed of him for that moment, the applicant patiently waited for the delivery of the records of proceedings and the grounds of judgment, but both remained undelivered until this day. From the repeated queries made to the lower court registry it was ascertained that the Magistrate, who tried the case, had taken possession of the entire records for the purpose of writing his grounds of judgment. When the Magistrate left Melaka to pursue his degree course at the University of Malaya, he took along the record of this case and several others with him to the campus and, for reasons best known to him, he had ignored or neglected to write the grounds of his decision or return the records of proceedings to the registry in spite of numerous demands by the court as well as higher authorities. It may be some consolation to us that he is no longer with the judiciary, but his departure from our ranks will not enlighten the plight of the applicant, who had waited for about 3 years for his appeal to be heard. The prospect of having his appeal in perpetual abeyance, not to mention the hardship and suffering, must have prompted the applicant to approach by way of revision. The application for revision is made with a three-fold purpose. Firstly to move the court's intervention; secondly to resist any order for retrial and thirdly to secure an acquittal.

At the outset of these proceedings Mr. Hilary D'Cruz, counsel for the applicant, was quick to prognosticate his predicament in arguing a unique application for which there existed no decided authority. In this respect I fully appreciate the learned counsel's dilemma, as I have not been able personally to trace any judicial procedure for such application. The power of revision has been exercised from time to time by the High Court in order to correct any imbalance of justice arising from judgments and orders of the subordinate courts, but no High Court has so far been exhorted to exercise its revisionary powers to redress injustice originating from a Magistrate's incompetence, irresponsibility and indolence.

Counsel strongly urged me to rely on the power of revision under section 323 of the Criminal Procedure Code, which he contends, should be extended for use under exceptional circumstances such as our present case. The strict wordings of that section, however, induced me to interpret it with some reservation.

New section 323 reads:

"323(i). A judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court."

My first impression on reading the above section was that the section merely empowered a judge to exercise his revisionary powers after he had examined the records of any criminal proceedings before an inferior court; that it did not give him the power to revise the decision of a lower court where the proceedings was not available and that the powers of revision, as mentioned in Chapter XXXI of the Code, were only exercisable subject to the availability of the records of proceedings.

If that be the case, then the powers under this chapter could not be appropriately exercised by this court and the applicant herein will be left entirely without remedy. That, to my mind, is not what the lawmakers exactly intended it to mean. The powers of revision by a High Court, as contained in Part VII of the Criminal Procedure Code and section 31 of the Courts of Judicature Act must be given a wider interpretation.

Although both make specific mention for calling for records of proceedings, they should not be read as restricting or derogating from the obvious intention of the legislature to clothe the High Court with its parental or supervisory jurisdiction. The object of these provisions is to correct any miscarriage of justice

arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence.

Reference to the calling and examining of records of proceedings, to my mind, is to be interpreted as power enabling the High Court to require the production of the records before it and not as a mandatory direction.

If that phrase is to be given a stricter interpretation, no court can exercise its revisionary powers to correct any miscarriage of justice where the records of proceedings have become unavailable. If I am wrong on this and the section is to be construed as falling short of giving me powers to correct miscarriage of justice and our Code contains no provision remedying such error or neglect, then section 5 of the Criminal Procedure Code may still come to the accused's rescue so that the law relating to criminal procedure in England may be applied by this court. In this respect, my attention has only been drawn to one analogous English authority, which, nevertheless, will lend some support for my view. In *Connelly* v. *Director of Public Prosecutions*[1] Lord Devlin, whilst considering the question of applicability of estoppel in criminal cases, propounded the inherent powers of the court to exercise jurisdiction in respect of matters not provided for in the criminal law of procedure. At page 408 His Lordship expressed:

"... in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides ... I propose to put under three heads the reasoning which, in my opinion, supports this conclusion. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law and I shall illustrate this with special reference to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained, there could be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law.

Under the first head I must observe that nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their powers to see that what was fair and just was done between prosecutors and accused. The doctrine of autrefois was itself doubtless evolved in that way. The process is still continuing and it is easy to think of recent examples. The Judges' Rules were formulated first in 1912, the latest revision being in the present year, in order to protect the accused against the result of unfair questioning. It was questioning within the law as it then stood. In the present case it has been argued that the well-established rule of autrefois gives to the accused all the protection to which he is entitled against double jeopardy. It might equally well have been argued that the well-established rule that confession must be voluntary gave the accused all the protection to which he was entitled against unfair questioning. If that argument had prevailed, there would have been no Judges' Rules.

Another example is the power the courts have assumed to insist that notice of additional evidence must be given of all witnesses who have not made depositions. This was described by Lord Goddard C.J., in *R.* v. *Chairman, County of London Quarter Sessions, Ex p. Downes* [1963] 2 All E.R. at page 752 as a requirement of modern practice. Then there is the rule that the defence must be supplied with the names of any material witness interviewed by the prosecution whom it does not intend to call; *R.* v. *Bryant* (1946) 31 Cr. App. Rep. 146. Likewise the rule that the defence must be given a copy of any report made by the prison doctor about the state of mind of an accused person in custody; *R.* v. *Casey* (1947) 32 Cr. App. Rep. 91. In 1955 the judge of the Queen's Bench gave a practice direction [1955] 1 All E.R. 386 which required *inter alia* that particulars of a prisoner's previous convictions must be given to the defence so that counsel could know whether or not he could safely put his client's character in issue. This was supplemented by a further rule the defence must be told of convictions affecting the credibility of the prosecution's witnesses; *R.* v. *Collister and Warhurst* (1955) 39 Cr. App. Rep. 100. All these are rules of practice which no one disputes the power of the court to make and enforce."

Although the decision in *Connelly's* case has been distinguished, criticized and dissented from in later cases relating to estoppel in criminal cases, the issue of the court's inherent powers remained the same, albeit with some qualifications. In *Director of Public Prosecutions* v. *Humphrys*[2] Lord Salmon, in the course of his judgment, acknowledged that such powers are exercisable by the courts. At page 527 his Lordship said:

"My noble and learned friend, Viscount Dilhorne, considers that there is no authority for the proposition. I should have thought that the opinion of Lords Devlin, Pearce and Parker C.J. in themselves constitute powerful authority. But these are by no means the only authorities. In *Metropolitan Bank Ltd.* v. *Pooley* (1885) 10 App. Cas. 210 at 220, 221 Lord Blackburn said:

But from early times ... the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing — the court had the right to protect itself against such an abuse. ...'

and Lord Selborne L.C. (10) App. Cas at 214 said: 'The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure.' I have no more doubt than had my noble and learned friends, Lords Devlin and Pearce, that Lord Selborne L.C. and Lord Blackburn would have considered their words to be as applicable to criminal as to civil proceedings."

His Lordship felt, however, that these powers of intervention by the courts were limited to rare and exceptional cases.

To put it more shortly, the powers of the courts to intervene and make rules not provided in the criminal procedure are inherent and are exercisable to correct any injustice. The power to make rules such as the Judges' Rules, notice of additional evidence and power to expunge words from records are some examples of this inherent power. By virtue of section 5 of our Code, the use of this power could be extended to this country provided, of course, it does not conflict with our statutory provisions.

I am convinced that our courts possess similar inherent powers to act, or to intervene, in any matter for which no procedure has been laid down and for the purpose of preventing injustice.

I rule therefore that this court, in exercise of such inherent powers, may exercise this revision.

The next thing for consideration here is the proper order which this court should make in the light of all those things which have transpired. The learned deputy understandably felt that an order for retrial would be the most appropriate order under the circumstances, as the events leading to the loss of the records could not be attributed to the prosecution. The prosecution is, no doubt, blameless for this unfortunate episode, but what we are concerned with at this stage

is not so much as to the verdict of the prosecution's or the Magistrate's fault, but how to provide a just remedy to the applicant's case.

The applicant has been denied justice for almost 3 years since he filed his notice of appeal against his conviction on a comparatively small offence and in respect of which I am told the complainant suffered only a broken tooth. For this the applicant suffered interdiction and half salary for 1½ years and a further 2½ years without any pay at all. An order for retrial would, no doubt, involve further delay not to mention expense and suffering which he will be put to. Should we allow the conviction to hang around his neck indefinitely, or should we hand out immediate justice?

The concept of setting aside convictions is not a new concept. The High Courts have often quashed convictions when the Presidents Sessions Courts and Magistrates have erred in their decisions. In such cases the court should concern itself not so much with the responsibility for, but whether the accused suffers, injustice.

A retrial in this case must lead to undeserved hardship and injustice to the accused. After a lapse of 4 years his own memory of the incident must be rather faint, if not entirely clouded by now; witnesses may have little or no recollection and some may be no longer available. Some evidence in his favour might have, and in the case of documentary evidence must have, perished. He has not, like the prosecution, the advantage of statements from witnesses which could account accurately his side of the story and prevent witnesses from turning hostile.

Should he be exposed to the perils of a second trial and all the inconvenience and hardship merely for a small offence for which the trial Magistrate only bound him over without recording a conviction and, in respect of the second charge, imposed a small fine?

A somewhat similar circumstance involving more serious charges arose in *R.* v. *Payne & Spillane.*[3] In that case, due to a mistake, the shorthand notes of the summing up to the jury were not properly taken down by a competent shorthand writer and were therefore unavailable on appeal. The Court of Criminal Appeal quashed the conviction because of what Megaw L.J. described as "... very great difficulties and the very great possibility of miscarriage of justice..." (page 1148 f-g).

On a careful consideration of the nature of the offences and the circumstances under which they were allegedly committed (from undisputed statement from the bar) and having regard to the difficulties and undeserved hardships unfairly facing the applicant in the event of the retrial of these cases as well as other oppressive circumstances adversely affecting the applicant (including his resultant ill-health), I am of the view that both the principles of justice and equity call for my intervention and the exercise of my inherent and statutory powers in this revision.

The inordinate and inexpicable delay in the disposal of these appeals; the deprivation of his statutory rights to the records of appeal and consequently the denial of the opportunity to be heard on appeal are, in my opinion, strong mitigative, if not lawful, grounds for quashing the previous orders made against the applicant.

The learned Deputy Public Prosecutor had dutifully submitted that this court should order a retrial because we owed a duty to the complainants. With respect, I am unable to share this view. Our courts have a long time since progressed from the "eye for an eye" and "tooth for a tooth" type of justice. The avowed aims of punishments are retribution, justice, deterrence, reformation and protection, but it is never intended to act as a vehicle of vengeance. This court does not sit here to hand out to victims of aggression their "pound of flesh" but generally to protect society by enforcing justice. Justice here does not mean justice to the accuser alone but also to the accused and justice will be better served in the present instance to free a person, who had been unjustifiably deprived of his right to appeal, from the jeopardy of a second trial. Even if the earlier conviction could be proved to have been properly made, the applicant is nevertheless entitled to a humane treatment in view of hardships arising from the delay.

The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognised machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

No matter what be our order here, it will not have the effect of mending the complainant's tooth. Quashing the conviction here will not deprive the complainants of their personal right to sue for damages and they could be suitably recompensed by appropriate awards for damages in respect of any alleged injuries, pain or suffering, if they cared to file their suits at all.

I hereby set aside the finding and the binding over order made under section 173A(ii)(b) of the Criminal Procedure Code by the Magistrate and in lieu thereof I acquit and discharge the applicant on the first charge.

Similarly I quash the conviction and acquit and discharge the applicant on the second charge and order that the fine, if paid, be refunded to him.

Accused acquitted and discharged on both charges.

Solicitors: *Vohrah & Tan Chee Lan.*